UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MISLAV BASIC, NATHAN GRUBER, KEVIN BOUDREAU, DANIEL SCHWAIBOLD, and KEITH ZACHARSKI, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

BPROTOCOL FOUNDATION, LOCALCOIN LTD., GALIA BEN-ARTZI, GUY BEN-ARTZI, EYAL HERTZOG, YEHUDA LEVI, and BANCOR DAO,

Defendants.

Case No: 1:23-cv-00533-ADA

Hon. Alan D. Albright

PLAINTIFFS' OPPOSITION TO NON-PARTY JENNIFER ALBERT'S MOTION FOR A PROTECTIVE ORDER

Lead Plaintiffs Mislav ("Michael") Basic, Nathan Gruber, Kevin Boudreau, Daniel Schwaibold, and Keith Zacharski (collectively, "Plaintiffs") hereby respectfully oppose Non-party Jennifer Albert's Motion for a Protective Order.

INTRODUCTION

Non-party Jennifer Albert seeks to enforce a stay that does not exist, in a case to which she is not a party, against discovery requests that may not apply to her, in an opposition styled as a motion for a protective order. This stalking-horse opposition on behalf of dismissed defendants should be denied.

On May 27, 2025, Plaintiff's moved for leave to conduct discovery in support of default judgment against Bancor DAO. ECF No. 83.[1] This motion followed Judge Pitman's order reinstating Plaintiffs' claims against Bancor DAO. ECF No. 77. In briefing that reinstatement, Plaintiffs argued that the Report dismissing Plaintiffs' claims against the Moving Defendants relied on "purported comity concerns applicable only to Moving Defendants, which 'reside' in foreign jurisdictions. . . . But Bancor DAO—which is never mentioned in the analysis—is 'an unincorporated general partnership' that does not reside in any jurisdiction, domestic or foreign." *Id*. at 7. Plaintiffs' allegations against Bancor DAO tracked Moving Defendants' own statements about its independence: Moving Defendants have argued that the DAO, a "decentralized autonomous organization," "own[ed] and operat[ed] Bancor." First Amended Complaint ("FAC") ¶¶ 22, 22 n.3. They have also claimed that, with respect to the relevant securities transactions, "risk is shifted from [investors] to Bancor DAO," and that the Bancor investment platform is under "the exclusive control of Bancor DAO." FAC ¶¶ 148, 75.

[1] Capitalized terms refer in the same way defined in Plaintiffs' Motion for Leave to Conduct Discovery.

Moving Defendants have simultaneously attempted to distance themselves from Bancor DAO and to argue on Bancor DAO's behalf, and Albert's Motion is no different. Counsel for Moving Defendants first appeared on behalf of Bancor DAO and then disclaimed Bancor DAO's representation. *See* ECF Nos. 42, 42-1 at ¶¶ 3, 4. Despite this distancing, Moving Defendants also tried to argue that claims against Bancor DAO should be dismissed. Judge Pitman denied this effort. ECF No. 77 at 3 ("Bancor DAO was not a party to the motion to dismiss, and parties may not move for dismissal on behalf of other parties."). Now, third-party Albert seeks to press Moving Defendants' arguments again, untimely opposing Plaintiffs' motion for leave to conduct discovery, seeking sweeping relief that bears no relationship to her involvement, and asking this Court to dismiss Bancor DAO.[2]

Albert's Motion should be denied. First, she ignores the requirements for the ostensible relief she seeks, a protective order: she makes no attempt to carry her burden to show "good cause" for such an order through the demonstration of particular facts, and she provides no authority for the unlikely proposition that a third-party has standing to seek a case-wide stay in these circumstances. Second, Albert's interpretation of the PSLRA's discovery stay falters at the first step, the statutory language. There is no motion to dismiss pending, and therefore the PSLRA stay has lifted. Third, Albert's argument that discovery is inappropriate in the default judgment context contradicts established law, which expressly permits—and in some circumstances requires—discovery to establish jurisdiction and assess the merits of claims against defaulting defendants.

[2] Albert inexplicably asks this Court to "den[y] default judgment for the same reasons that the Court granted the prior motion to dismiss," though no motion for default judgment has been filed. Mot. at 9 n.4.

ARGUMENT

I. Albert Fails to Show She is Entitled to a Protective Order

Under Federal Rule of Civil Procedure 26(c), the court may issue an order protecting a party or person from whom discovery is sought upon a showing of good cause. *Southwestern Bell Telephone, L.P. v. UTEX Comms. Corp*, 2009 WL 8541000, at *1 (W.D. Tex. Sept. 30, 2009). "The burden is on the person seeking a protective order to show why protection is warranted." *Id.* (citing *Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 435 (5th Cir. 1990)). Albert can meet this burden only by making "a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *In re Terra Int'l, Inc*., 134 F.3d 302, 306 (5th Cir. 1998) (quoting *United States v. Garrett,* 571 F.2d 1323, 1326 n.3 (5th Cir. 1978)).

First, Albert has made no showing of "a particular and specific demonstration of fact," to support a finding of good cause, much less "a showing specifically how each discovery request is not relevant or otherwise objectionable." *Humphries v. Progressive Corp.,* 2022 WL 1018404, at *2 (N.D. Tex. Apr. 5, 2022) (denying protective order for failure to explain good cause, quotation marks and citation omitted). Albert's vague gestures to "burdensome discovery" reflect nothing more than "stereotyped and conclusory" statements about discovery in securities class actions. She similarly fails to provide facts that would support a finding that *all* discovery Plaintiffs have requested—or may request in the future—poses an undue burden. Albert's showing is far short of good cause. *See Anzures v. Prologis Texas I LLC*, 300 F.R.D. 316, 318 (W.D. Tex. 2012) ("Plaintiff does not provide any particular and specific demonstrations of fact supporting his requests for relief . . . Such fails to establish that good cause and a specific need for protection[.]").

Second, Albert fails to establish her standing, as a third-party, to seek the broad relief she requests: a case-wide stay of discovery. She mistakenly cites two cases for this proposition. First, Albert cites *Fund Texas Choice v. Deski*, 2023 WL 8532404, at *2 (W.D. Tex. Dec. 8, 2023), for

the proposition that the court granted a "non-party's motion for a protective order and stay of discovery." Mot. at 5. But the *Fund Texas* court did no such thing. The *plaintiffs* in that case moved to stay discovery; the non-party moved for an order of protection and to quash a subpoena. *See generally* Plaintiff Buckle Bunnies Fund's and Non-Party Makayla Montoya-Franzier's Motion for Protective Order, Motion to Quash Subpoena, and Objections to Third-Party Subpoena (Nov. 30, 2023), *Fund Texas Choice v. Deski*, No. 1:22-CV-859-RP (W.D. Tex.) at ECF No. 250. The second case, *Mackenzie v. Castro*, 2015 WL 8958872 (N.D. Tex. Dec. 16, 2015), did not involve a third-party or third-party discovery at all. There, the Court granted a protective order to the *defendants* pending the *pro se* plaintiff's amendment of the complaint. *Id*. at *1-2.

Third, even indulging Albert's belief that "preliminary questions that may dispose of the case" are somehow pending (Mot. at 5), Albert does not meet the standard to stay discovery. In such circumstances, the court's discretion to grant a stay is informed by "(1) the breadth of discovery sought; (2) the burden of responding to such discovery; and (3) the strength of the dispositive motion filed by the party seeking a stay." *See Griffin v. Am. Zurich Ins. Co.*, 2015 WL 11019132, at *2 (N.D. Tex. Mar. 18, 2015). Here, Albert has made no specific showings with respect to the first and second factors. As Plaintiffs argue in their motion for leave to conduct discovery, the requested discovery is necessary, narrowly tailored, and not prejudicial. *See* ECF No. 83 at 6. And Albert's showing with respect to the third factor requires hypothesizing a motion for default judgment and this Court's treatment of it under the wrong standards, *see infra* at III. This reverie is not sufficient to meet Rule 26's demands.

II. The PSLRA Stay No Longer Applies

The PSLRA speaks for itself. Under the provision setting forth the PSLRA's statutory stay, 15 U.S.C. § 78u-4(b)(3)(B), "[i]n any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court

finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party." There is no motion to dismiss pending, and therefore the PSLRA stay has lifted.

Despite purporting to interpret this provision, Albert does not begin with—or even quote—this language because it forecloses her arguments. "The task of statutory interpretation begins and, if possible, ends with the language of the statute. . . . When the language is plain, we must enforce the statute's plain meaning, unless absurd." *Franco v. Mabe Trucking Co., Inc.*, 3 F.4th 788, 792 (5th Cir. 2021) (citations and quotation marks omitted). Instead, Albert gives pride of place to the PSLRA's supposed legislative history in arguing that the stay should apply here. *See* Mot. at 6-7 (citing *SG Cowen Sec. Corp. v. U.S. Dist. Ct. for N. Dist. of CA*, 189 F.3d 909, 913 (9th Cir. 1999) (relying on legislative history); *Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 709 (S.D. Tex. 2002) (same)). But looking to legislative history as Albert does "is generally discouraged in this circuit." *United States v. Moore*, 71 F.4th 392, 395 (5th Cir. 2023).

Indeed, under principles of statutory interpretation applicable in the Fifth Circuit and elsewhere, the PSLRA's language means what it says: the stay applies "during the pendency of any motion to dismiss," and does not apply if there is no such pendency. *See Rensel v. Centra Tech, Inc.*, 2 F.4th 1359, 1362-63 (11th Cir. 2021); *see also Dartley v. Ergobilt, Inc.*, 1998 WL 792500, at *2 (N.D. Tex. Nov. 4, 1998) ("[U]nder the PSLRA, discovery must be stayed only when a motion to dismiss has actually been filed. There is no motion to dismiss currently pending before this court."); *St. Lucie Cnty. Fire Dist. Firefighters Pension Tr. Fund v. Stericycle, Inc.*, 2020 WL 13614342, at *4 n.1 (N.D. Ill. May 19, 2020) (PSLRA stay no longer in effect "because the Court denied Defendants' motion to dismiss without prejudice . . . , and so the motion is no longer pending"), a*ff'd in part, vacated in part, remanded sub nom. In re Stericycle Sec. Litig.*, 35

F.4th 555 (7th Cir. 2022). In *Rensel*, for example, the Eleventh Circuit applied the plain language of the PSLRA to conclude that the discovery stay applies only "during the pendency of any motion to dismiss" and "automatic[ally]" lifts when no such motion remains pending. 2 F.4th at 1362. In that similar case, after the district court entered default against Centra Tech for failure to appear and resolved the motions to dismiss in favor of other defendants, the court held that "at long last, no motions to dismiss remained pending, and the PSLRA discovery stay lifted once and for all." *Id*. at 1363. Albert does not, and cannot, argue that this interpretation of the PSLRA's plain meaning is "absurd." *Franco.*, 3 F.4th at 792.[3]

Instead, Albert uniformly relies on cases addressing the statutory factors applicable to lift the stay, not on cases applying the stay in extra-statutory circumstances. *See In re Cassava Scis., Inc. Sec. Litig.*, 2023 WL 28436, at *2 (W.D. Tex. Jan. 2, 2023) (discussing standard to lift the PSLRA's stay); *In re Comdisco Sec. Litig.*, 166 F. Supp. 2d 1260, 1263 (N.D. Ill. 2001) (same); *Edwards v. McDermott Int'l, Inc.*, 2021 WL 5121853, at *1 (S.D. Tex. Nov. 4, 2021) (same, and noting that "[i]n accordance with the terms of the PSLRA's discovery stay, no discovery took place while this Court considered Defendants' motions to dismiss the claims brought under §§ 10(b) and 14(a) of the Securities Exchange Act of 1934. When those motions were denied earlier this year, discovery began."); *Davis v. Duncan Energy Partners L.P.*, 801 F. Supp. 2d 589, 595 (S.D. Tex. 2011) (same). Exceptions to the stay are creatures of statute; Albert's proposed application is not. Indeed, by citing only lift-the-stay cases, Albert implicitly concedes that when the PSLRA stay applies, courts must analyze specific statutory factors to override it. Not only does Albert ignore

[3] Some courts have applied a stay before a motion to dismiss has been filed as an exercise of discretion, not under the PSLRA. *See Dartley*, No. 3:98-cv-1442-G, Order, ECF No. 24 at 1-2 (N.D. Tex. Nov. 3, 1998) ("In interpreting the mandatory stay provision of the Reform Act, courts have stayed discovery against defendants where the filing of a motion to dismiss is imminent. However, under the plain language of the statute no stay is mandated where a motion to dismiss has yet to be filed. Therefore, in my opinion whether a stay should be granted under such circumstances is addressed to the broad discretion of the court."). As described above, Albert has otherwise failed to meet her burden to establish a discretionary stay under Rule 26.

these factors, but Albert's analysis reinforces the statutorily bounded nature of the PSLRA's discovery restrictions.

Finally, Albert's argument leads to absurd results. The heightened standard plaintiffs must meet to lift the PSLRA stay exists to shield defendants who are challenging the sufficiency of plaintiffs' claims through motions to dismiss. Here, Bancor DAO has defaulted and failed to appear at all—it has forfeited any right to challenge the sufficiency of the claims and cannot be "prematurely" subjected to discovery it has chosen not to contest. *See* Mot. at 8. Moreover, under Albert's view, plaintiffs cannot obtain *any* discovery when defendants default in cases brought under the PSLRA. Among other things, this places the PSLRA into conflict with Rule 55. Fed. R. Civ. P. 55 (on a motion for default judgment, courts are empowered to "establish the truth of any allegation by evidence" or "investigate any other matter."). It also immunizes defaulting defendants where plaintiffs require discovery to establish factual grounds for liability and damages. The PSLRA was not created as a safe harbor for defendants to ignore lawsuits.

III. Discovery is Appropriate Here

Albert's notion that a default judgment must be decided only on the basis of the complaint finds no support in the law. Federal Rule of Civil Procedure 55(b)(2) expressly empowers courts to "conduct hearings" and "investigate any other matter" when considering default judgment applications. Moreover, the Fifth Circuit has repeatedly emphasized that courts have an "affirmative duty" to investigate personal jurisdiction before entering default judgment. Albert's position would require this Court to abdicate that duty.

"In building a prima facie case of personal jurisdiction for default judgment, the plaintiff may rest its argument on well-pleaded factual allegations in the complaint, *the record, and depositions and affidavits*." *See Viahart, LLC v. Chickadee Business Solutions*, LLC, 2021 WL 6333033, at *4 (E.D. Tex. July 2, 2021) (emphasis added), *report and recommendation adopted*,

2022 WL 1262125 (E.D. Tex. Apr. 27, 2022); *Orr Auto, Inc. v. Autoplex Extended Services, LLC,* 2024 WL 4901519, at *3 (E.D. Tex. Oct. 21, 2024) (same), *report and recommendation adopted*, 2024 WL 4893951 (E.D. Tex. No. 26, 2024); *see also* Fed. R. Civ. P. 55. Albert's argument rests on the mistaken premise that "Plaintiffs cannot demonstrate any need for the discovery" because "Plaintiffs' anticipated motion to dismiss will be heard on the equivalent of a motion to dismiss standard." Mot. at 8. But that, too, is incorrect. The Fifth Circuit expressly "decline[d] to import Rule 12 standards into the default judgment context" because "a default judgment is the product of a defendant's inaction." *Wooten v. McDonald Transit Associates, Inc*., 788 F.3d 490, 498 n.3 (5th Cir. 2015).

Indeed, the Court has "an affirmative duty" to investigate personal jurisdiction before entering a default judgment. *LMC Props., Inc. v. Prolink Roofing Sys., Inc.*, 2024 WL 4449421, at *6 (5th Cir. Oct. 9, 2024). This duty forecloses the broad stay of discovery that Albert seeks in part because—unlike the other defendants—Bancor DAO purports to be locationless "unincorporated general partnership" that exists only online. FAC ¶ 22. Discovery into the nature of this unusual entity's contacts with the United States is therefore particularly appropriate to satisfy this Court's duty. *See Box v. Dallas Mexican Consulate Gen.*, 487 F. App'x 880, 885 (5th Cir. 2012) (district court abused discretion by not allowing discovery of jurisdictional facts). Such discovery would also promote judicial economy because it would reduce the risk of relitigating a default judgment under Rule 60. *See, e.g*., *id*; Fed. R. Civ. P. 60(b)(4).

Albert's attempts to distinguish cases cited in Plaintiffs' motion for leave to conduct discovery do not suggest otherwise. Indeed, in *Ako v. Arriva Best Sec., Inc.*, the court allowed discovery "where the defendants are in default, but the plaintiff is unable to obtain a default judgment because the Court has found his pleadings deficient, and the plaintiff maintains that the

information needed to cure his deficient pleadings." 2024 WL 4995570, at *1 (N.D. Tex. Dec. 5, 2024). Albert distinguishes *Ako* on the grounds that the court's order "arose *after* a motion for default judgment." Mot. at 9 (original emphasis). Albert neglects to inform the Court that this motion was denied with leave to move again, placing the *Ako* plaintiffs in the same posture as Plaintiffs here. 2024 WL 4995570, at *1.

Nor are Albert's other distinctions supported by authority, including her arguments that merits, damages, and class certification discovery are "premature." For example, Albert cites *ReSea Project ApS v. Restoring Integrity to the Oceans, Inc.,* 2022 WL 19575585 (W.D. Tex. July 19, 2022), to argue that "merits discovery is premature." Mot. at 8. But *ReSea* does not address the timing of merits discovery—or any discovery—in the context of default. *Id*. at *1-2. Similarly, Albert reads into *Rodriguez v. Avalos*, 2019 WL 13472243 (W.D. Tex. Apr. 12, 2019), a requirement to delay damages discovery that does not exist. There, the court merely gave the plaintiff the option to seek statutory damages as a sum certain (without discovery) or actual damages (with discovery). *Id*. at *1-2.

CONCLUSION

For the foregoing reasons, the Court should deny Non-Party Jennifer Albert's Motion for a Protective Order in its entirety.

DATED: June 16, 2025

Respectfully Submitted,

/s/ Timothy W. Grinsell

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Timothy W. Grinsell
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